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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1943.

No. 848.

THE BROTHERHOOD OF RAILROAD TRAINMEN, ENTERPRISE LODGE NO. 27, et al.,
Petitioners,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF PETITIONERS.

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OPINIONS OF THE LOWER COURTS.

The Seventh Circuit Court of Appeals' opinion is reported in 132 Fed. (2d) 265 and set forth in the record (R. 1020). No opinion of the District Court is reported, but the oral statement made upon granting the temporary injunction begins at record page 954.

GROUNDS FOR JURISDICTION OF THIS COURT.

Jurisdiction in invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (U. S. C. A., Title 28, § 347), providing for review by this Court by certiorari, which was granted April 19, 1943.

STATEMENT OF THE CASE.

This case presents a review of a Seventh Circuit Court of Appeals' judgment affirming an injunction in a labor dispute. There is no diversity of citizenship. The District Court for the Southern District of Illinois restrained striking employees from extensive picketing and violence. The Court of Appeals affirmed through an opinion (132 Fed. [2d] 265) by District Judge Lindley, in which Justice Sparks joined (R. 1020). Circuit Judge Minton filed a dissenting opinion (R. 1032) in which he held lack of a federal question and no jurisdiction, and also that plaintiff railroad failed to meet requirements of the Norris-La Guardia Act, in that it refused to make reasonable efforts to settle the dispute before the strike and prior to seeking equitable relief in court.

The District Court issued a temporary restraining order January 3, 1942, without notice on the day the complaint was filed. The order was extended on January 8, 1942, and again on January 16th. After evidence a temporary injunction was issued on January 19, 1942. Contempt proceedings were later brought in the District Court (R. 985-989).

Plaintiff railroad is an Illinois corporation. Its road extends from Indiana to Iowa through Illinois. It had 600 employees (R. 760), but only 104 were conductors, engineers and firemen, who went on strike December 29, 1941. In October, 1940, the two Brotherhoods became union rep-

resentatives of these 104 employees, according to the Railway Labor Act. Negotiations ensued with the aid of the National Mediation Board for rates of pay and working conditions, but terminated November 6, 1941, without an agreement. The Brotherhoods called a strike for December 9th, but agreed to an indefinite postponement after the attack on Pearl Harbor. Negotiations were resumed, but an agreement was not reached. The employees, however, remained at work under the old conditions and pay.

On December 17th and again on December 28th the National Mediation Board requested the Railroad and the employees to submit to arbitration in view of the national emergency (R. 791). The employees agreed but the employer refused and has maintained its refusal up to the present (R. 789).

On December 21st the Railroad served notice that its own rates of pay and working conditions would go into effect December 29th (R. 11). The 104 employees had the alternative to accept or withdraw from service. They quit work December 28th and plaintiff supplanted them with nonunion employees.

Picket lines were formed and there were incidents of assault and violence on December 29th, 30th, 31st and January 1st and 2nd (R. 137, 148, 171, 189). During the strike plaintiff employed twenty-nine armed guards or special agents to ride the trains (R. 784). One of the strikers, Dilley (R. 824), was shot as he stood near the right of way by a special agent in the cab of a locomotive. The only substantial damage to property was shattered glass in cabs, headlights and switches. Plaintiff did not cease operation of its road, but there were some temporary delays. Two individuals were arrested (R. 82, 393, 839). The record discloses no other request for arrests during the strike. Practically all complaints of violence originated in Peoria and adjoining County of Tazewell,

Illinois (main office of plaintiff). Mr. Beste, superintendent of plaintiff, testified (R. 76) that the police chief of the Village of East Peoria told him ample protection could not be guaranteed but Beste said he knew of no occasion when police refused to respond to the scene of a disturbance.

The only public official called as a witness by plaintiff was the Sheriff of Peoria. He told of a phone conversation with Mr. McNear, president of plaintiff, in which the Sheriff assured he would do all he could to protect the road, but mentioned his force was limited (R. 380). This was the only occasion a representative of plaintiff contacted this Sheriff except January 2nd (R. 382), when the Sheriff's office had a phone call about probable trouble. Deputies were immediately dispatched. On December 31st plaintiff's president requested Sheriff Donahue of Tazewell County to post deputies on twenty-four-hour duty on the lane at the entrance to plaintiff's property where the strikers were picketing. The request was complied with (R. 724). On January 2nd Mr. McNear sent telegrams to the sheriffs of eleven Illinois counties through which the road operated (R. 734, 746), and requested each sheriff to telegraph whether he would furnish protection by supplying men "to ride and convoy the trains" through the respective county. Some sheriffs did not reply. Others said they would afford protection but could not supply officers to ride the trains (R. 735).

The complaint, which covers forty pages of the printed record (R. 3-43), was filed on Saturday, January 3rd, within twenty-four hours after Mr. McNear dispatched his telegrams. An ex parte hearing was held before the Court on Saturday afternoon and a restraining order issued the same day without prior notice to defendants.

The complaint charges a federal question or jurisdiction by averring that plaintiff is subject to Acts of Con-

gress (R. 3), i. e., "An Act to Regulate Commerce, the Railway Labor Act of U. S., and a Federal Statute entitled War Utilities." Also by averring (R. 28) that jurisdiction is invoked because of rights given plaintiff by the Constitution and Laws of the United States.

Defendants' answer denied a federal question and jurisdiction. The answer also denied averments of the complaint about violence, and that public officers were unable or unwilling to furnish adequate protection for plaintiff's property. The answer averred (R. 994) that the plaintiff refused reasonable efforts to settle the dispute with the aid of governmental machinery for negotiations, mediation and voluntary arbitration.

Both by his oral announcement and written order awarding the injunction (R. 955, 976) the District Judge decided there was a federal question in the controversy and jurisdiction because of the Act of Congress, namely, "An Act to Regulate Commerce," and all acts amendatory and supplementary thereto.

SPECIFICATION OF ERRORS.

(1) The lower courts erred by permitting an extension of the temporary restraining order beyond five days because Section 7 of the Norris-La Guardia Act declares that such an order **"shall be effective for no longer than five days and shall become void at the expiration of said five days."**

(2) The District and Appeals Courts erred by deciding that the controversy presented a federal question and by holding jurisdiction of the subject matter.

(3) The evidence did not show that public officers were unable or unwilling to furnish adequate protection for plaintiff's property. Section 7 (a) of the Norris-La Guardia Act requires such a showing as a condition precedent to an injunction and the lower courts erred in their refusal to dismiss the complaint on this ground.

(4) The law (Norris-La Guardia Act, Sec. 8) prohibits injunctive relief in a labor dispute to any complainant who has failed to make every reasonable effort to settle such dispute with the aid of governmental machinery. Plaintiff admits its refusal to comply with the request of the National Mediation Board for voluntary arbitration. The District and Appeals Courts erred by awarding the injunction under these circumstances.

ARGUMENT.

SUMMARY.

I. This case has not become moot. Because of the railroad management's refusal to settle the labor dispute out of which this case arose, the railroad is now federally operated. The regular management has repeatedly protested the working conditions under which the road is now federally operated, which were the conditions involved in the labor dispute. The management has also requested the early return of operations to it. Unless the injunction is dissolved, any person, upon return of the road, will be subject to fine or imprisonment for its violation.

Three men have been found guilty of contempt for violation of the temporary injunction. The District Court has suspended a fine or imprisonment sentence awaiting the decision of this Court of this appeal. A finding by this Court that the District Court was without jurisdiction as we urge here, will free these men.

The case is not moot because this appeal will decide the question of liability on the injunction bond and of damage for its issuance.

II. The temporary restraining order was issued January 3, 1942. Section 7 of the Norris-La Guardia Act clearly states that this order was effective "FOR NO LONGER THAN FIVE DAYS AND VOID AT THE EXPIRATION OF FIVE DAYS." On January 8, 1942, the District Court (R. 66) ordered an extension of the same order for a period of nine days, and on January 16, 1942, the Court again ordered (R. 965) that the order of January 3, 1942, should be extended for a period of three additional days. The clear language of the statute prohibits these extensions, and the Circuit Court of Appeals should have decided that the orders were void.

III. Neither the complaint nor evidence demonstrates that a decision of this controversy requires the application or construction of the Constitution or any law of the United States. For this reason the suit should have been dismissed for lack of federal jurisdiction of the subject matter. The Appeals Court expressly concedes the long-established rule, but holds (R. 26) that because the Interstate Commerce Act imposes certain duties on a common carrier that a federal court has jurisdiction to restrain third parties not regulated by the Commerce Act (striking employees) from interfering with the performance of such duties by the carrier. But the opinion of the Circuit Court of Appeals declares: "The Interstate Commerce Act includes no specific provision as to restraint of violent strikes against a carrier engaged in interstate commerce at the suit of the carrier" (R. 1024). By its own language the opinion admits a lack of legislative foundation for the injunction and the absence of a federal law as a basis for jurisdiction. The opinion announces a new doctrine of enlarged jurisdiction for injunctions and other common-law remedies without congressional sanction, and should not be allowed to stand.

IV. Section 7 of the Norris-La Guardia Act requires a finding that public officers are unwilling or unable to protect property as a condition precedent to an injunction. Under Illinois law the same finding would be sufficient to remove a sheriff from office and to impugn the sovereign competency of the state. The Sheriff has the power to deputize practically all adult citizens and the Governor has the duty to employ the militia. There is no evidence the Governor was requested to act in this controversy. There were but 104 men on strike. Plaintiff had twenty-nine armed guards, and the evidence fails to show that local officers were unable or unwilling to perform their duty to protect property.

V. The strike was provoked by plaintiff's' declaration of December 21, 1941, that its own rates of pay and working conditions would go into effect December 29th. Plaintiff knew these conditions were unacceptable to the men. The employees were then at work and no strike order was pending. The employees had agreed on December 17th to submit to voluntary arbitration at the request of the National Meditation Board. They repeated their willingness to do this on December 28th. The nation was then at war and a national emergency existed. The employer refused these same requests for arbitration which would have prevented the strike. Section 8 of the Norris-La Guardia Act prohibits an injunction when the evidence shows that a complainant has failed to exercise reasonable efforts to settle the dispute by arbitration. By the law and this evidence the injunction was prohibited and should have been denied.

I.

The Questions Presented on This Appeal Have Not Become Moot.

On April 20th, 1943, after this writ of certiorari was granted, the clerk of this Court sent a letter to counsel in which he stated:

> "The Court has directed me to write counsel requesting that in their briefs and on the oral argument they discuss whether there are any facts which have made the case moot."

This injunction has not been altered, modified or dissolved in any respect and still stands in the same form and with the same effect as issued. After the injunction was awarded, contempt proceedings were instituted in the District Court, trials had and defendants found guilty, as later explained in this argument. The District Court imposed sentence, but ordered that such sentences should not

be executed until thirty days after final determination by this Supreme Court of this present cause.

On March 21st, 1942, by executive order No. 9108, the President of the United States ordered the Office of Defense Transportation to take possession of and operate the plaintiff railroad until the President should reinstate its regular management. The President's order shows that it was issued because of the railroad management's refusal to settle the same labor dispute out of which this present court proceeding arose. The Director of Defense Transportation did take possession of the railroad and is still operating it. The injunction is still in effect, but difficulties have subsided since the Director of Transportation has been the operator.

When the road was taken over by the Government the same rates of pay and working conditions that had been in effect on other railroads in the United States became operative with the resulting suspension of the strike. The regular management, through its president, Mr. McNear, during Government operation, has repeatedly protested these working conditions by letters to the Office of Defense Transportation, through the public press and by other means. Recently President McNear requested the Office of Defense Transportation to return the road to its regular management. The return of these properties to its corporate management may be effected at any time the President of the United States should so order. If not before, the road will be returned upon the termination of the present war emergency. Unless dissolved, dismissed or held invalid, this injunction will then and at all times be a vital writ and subject any person to trial and punishment who may offend its provisions.

It is clear from the foregoing that the issues of this controversy are distinctly alive and therefore not moot.

There exists another and a complete answer to this question. As shown by the record (p. 985), a rule to show

cause why they should not be held in contempt of court for alleged violation of the injunction was entered against H. J. Dilley, Delmar Newdigate and Paul Brokaw on February 2, 1942. The matter was then set for trial (R. 990) and actually did proceed to trial. After the trial the District Court, on April 7, 1943, entered an order fining these men the sum of $2,820.06 and ordering that if the fine were not paid by May 10th, 1943, they should be committed to jail until it was paid. This order reads in part as follows:

> "Upon consideration hereof, it is ordered, adjudged and decreed by the court that the said H. J. Dilley, Delmar Newdigate and Paul Brokaw, who have each heretofore been duly found guilty by the jury of the violation of the temporary injunction heretofore issued herein January 19, 1942, and their motion for new trial having been heard, considered and overruled, be and they are hereby fined in the sum of two thousand eight hundred twenty and 06/100 dollars ($2,820.06), together with court costs herein, for contempt of court for violation of said temporary injunction.
>
> "It is further ordered that the said H. J. Dilley, Delmar Newdigate and Paul Brokaw pay to the clerk of this court the said sum of two thousand eight hundred twenty and 06/100 ($2,820.06), the amount of the fine hereby assessed, together with court costs herein, on or before the 10th day of May, A. D. 1943, and that in default of payment thereof that the said H. J. Dilley, Delmar Newdigate and Paul Brokaw be and they are committed to and confined in the Peoria County Jail, Peoria, Illinois, until the payment of said fine and costs shall have been made."

On May 7th, 1943, after the granting of certiorari by this Court on April 19th, 1943, the District Court amended its order of April 7th, 1943, imposing sentence on these men, by directing that sentence should be suspended until this Court had determined the question involved in this appeal. This order reads in part as follows:

"That the order heretofore entered herein assessing as a fine the sum of $2,820.06 against the above named petitioners and directing that said fine and the costs thereof as assessed by the Clerk of this Court be paid into court on or before May 10th, 1943, be and the same is hereby amended as follows:

"(1) That the time within which said fine and costs may be paid by the petitioners herein shall be extended until the final determination by the Supreme Court of the United States and for a period of thirty days thereafter of the matter now pending before said Supreme Court of the United States, in which the Toledo, Peoria & Western Railroad is plaintiff and the Brotherhood of Railroad Trainmen et al. are defendants."

The District Court is thus waiting for the decision of this Court before it enforces sentence against these men. Questions presented to this Court relating to the temporary injunction are questions going to the basic jurisdiction of the District Court. It is well settled that lack of jurisdiction by the Court granting an injunction makes the injunction order void and there can be no contempt for its violation. Ex Parte Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. ed. 402; Ex Parte Fiske, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 1117; Abbott v. Eastern Massachusetts St. Ry. Co., 19 F. (2d) 463 (C. C. A. 1st). This rule is stated in 32 C. J. 498:

"Since, if an injunction is absolutely void, a disobedience thereof does not constitute a contempt of court, a perfect defense is made out where it is shown that the court was without jurisdiction to grant the injunction."

If this Court should hold that the jurisdictional requirements of the Norris-La Guardia Act or of the Judicial Code were not met, the original order granting the injunction was void, and these men are not guilty of contempt.

The temporary injunction is questioned here on the ground of lack of jurisdiction of the District Court. Consequently, if this Court reverses the order granting the temporary injunction on that ground these men have not been guilty of contempt and would not be sentenced by the District Court. If this Court affirms the order granting the temporary injunction the District Court will then proceed to enforce sentence thereby by fine depriving these men of their property or perhaps of their liberty. Where a man's property and liberty depend upon a decision on appeal, certainly the case is not moot and the Court is not deciding merely academic questions.

We feel that either of the above grounds fully dispose of any question that this case is a moot one. In order, however, that this discussion may be complete we wish to present another ground upon which this question may be decided.

Upon the granting of the temporary injunction the District Court required plaintiff to give bond in the amount of $5,000.00 (R. 983). The condition of this bond was that if the defendants were improvidently or erroneously enjoined, the principal and surety bound themselves to pay any loss, expense or damage caused defendants by the issuance of the injunction including expenses of defense. Defendants have sustained damage and expense in a considerable sum in this litigation. The decision on this appeal will determine whether or not there is any liability under the injunction bond for this damage and expense. It will determine a definite and substantial right, i. e., whether or not defendants may recover damages sustained by the issuance of the injunction.

Many cases, constituting the great weight of authority, have been decided in this country holding that a case is not moot where the appeal will decide the question of liability on the injunction bond and of damages for the issuance of the injunction.

In F. Burkart Mfg. Co. v. Case, 39 F. (2d) 5, a temporary restraining order was granted to prevent defendants from removing timber. On appeal it was contended that defendants had ceased their actions and the case had become moot. In holding that the case was not moot the Circuit Court of Appeals of the Eighth Circuit stated:

> "Furthermore, the record shows that, when the temporary restraining order was issued by the Court, the appellant was required to give bond. If the case should be dismissed a liability would accrue on said bond in favor of the appellees and against the appellant. If the judgment of the trial court should be left unreversed appellant therefore would be precluded as to facts vital to its rights. That being true, it is not merely a moot question."

In Click v. Sample, 73 Ark. 194, 83 S. W. 932, an injunction suit was brought to restrain members of a school board from entering into a three-month contract with a teacher to begin February 1, 1904. A temporary restraining order was entered. Upon the final hearing on May 6, 1904, the injunction was dissolved and an appeal taken. It was contended on appeal that the contract would have by its terms expired on May 1, 1904, a date prior to the final decree and the case was moot. In holding to the contrary the Court said, at page 932:

> "The appellees move to dismiss the appeal on the ground that the contract against which the injunction was leveled had expired by its terms prior to the taking of the appeal and insists that this Court should not entertain a case merely to decide abstract questions, where there is no substantial controversy remaining which is capable of enforcement, and that the costs, which are merely incidents of this terminated controversy, should not cause an appellate court to decide the abstract questions theretofore involved in order to adjudicate them. Authorities supporting these contentions are presented and have

been considered. While the contract in controversy cannot now be enforced or enjoined, there is a judgment of the chancery court dissolving the injunction, and, if that judgment stands unreserved, a liability is fixed upon the appellants and their sureties on the bond. That judgment fixing the liability is a substantial controversy, beyond the costs, and can only be reviewed by hearing this appeal."

In Crom v. Frahm, 33 Idaho 314, 193 Pac. 1013, suit was brought to enjoin a corporation from governing itself according to certain amended articles and by-laws. An injunction was issued upon the filing of a bond and an appeal taken from the issuance of the injunction. It was contended that the case had become moot because defendants had ceased to act according to the amendments. In denying that the case was moot the Court said at page 1013:

"In order to procure the issuance of the injunction respondents were required to give an undertaking in the sum of $1,000.00, to the effect that they would pay to the parties enjoined such costs, damages, and reasonable counsel fees as they might incur or sustain by reason of the injunction, if the Court should finally decide respondents were not entitled thereto. In view of this obligation it cannot be said the case now before us is without substance and the motion to dismiss is overruled."

In Norman v. Hess (Sup. Ct. of Mo.), 231 S. W. 997, a suit was brought to enjoin the construction of an apartment house allegedly contrary to the restrictive covenants running with the land. These covenants expired December 31, 1920. A temporary restraining order was entered and later dissolved after hearing on April 7, 1919. An appeal was taken and was pending on December 31st, 1920, when the covenants expired. It was contended in the appeal that the case had become moot because of this. In holding to the contrary the Court said, at page 998:

"Upon the issuing of a temporary restraining order by the trial court in this case plaintiffs were required to, and did, give a $5,000.00 injunction bond. On November 29, 1916, the restraining order aforesaid was dissolved by the Court and the temporary injunction denied. On December 2nd, 1916, defendants filed herein a motion to assess the damages on the bond aforesaid. The restrictions in the deed to defendant Hess terminated on December 31st, 1920. While this Court could not issue, or direct the lower court to issue, a restraining order enjoining defendants from constructing said building on block 4864 aforesaid by reason of the termination of said restriction, yet, as plaintiffs have incurred liability on said bond for damages, and have become responsible for the costs of this litigation, should the judgment below be affirmed or the appeal dismissed, they as well as the public still have an interest in the result of the litigation which requires at our hands an investigation of the merits."

In Axelson v. Columbine Laundry Co., 81 Colo. 496, 254 Pac. 990, a temporary restraining order was granted prohibiting defendant, a former employee, from soliciting plaintiff's customers until November 23rd, 1925, as his contract provided. During the pendency of the appeal November 23rd, 1925, passed and it was contended the question had become moot. In holding to the contrary the Court said, at page 994:

"As already stated, the court erred in not dissolving the temporary restraining order. But because of the conditions contained in the bonds given upon the issuance of the temporary restraining order, the defendants are entitled to a correction of the trial court's error in this respect."

In Eastern Union Co. v. Moffat Tunnel Improvement District (Del.), 178 Atl. 864, the Court stated, at page 869:

"That as the attachment below was vacated, the service and return quashed and the garnishee dis-

charged, if the plaintiff should succeed in reversing the order entered by the court below, the attachment could not be restored and its lien, if any there was, revived. Therefore, it is said, the question in this court is moot, and the writ of error should not be retained. To this the plaintiff replies by saying that it was required to give a bond in the court below to indemnify the defendant against all damage by reason of the attachment; and that it is entitled to have this court review the vacating order so that, in case it be determined that it was improperly entered, the plaintiff may be acquitted of its liability on the bond. We are of the opinion that this consideration supplies a sufficient answer to the defendant's motion under this head."

In Harris v. Barrett, 206 Ala. 263, 89 So. 717, an injunction was sought to restrain the enforcement of an ordinance regulating the removal of personal property from the City of Birmingham. It was contended the case was moot. The Court stated, at page 718:

"This is not a moot case, as is suggested by appellant's counsel, since liability on the injunction is dependent on the successful prosecution of the appeal."

In Jones v. Stauffer, 49 Idaho 287, 288 Pac. 419, the Court stated, at page 420:

"A motion to dismiss an appeal on the ground that the substance of the controversy between the parties has disappeared will be overruled if the appeal presents a question the decision of which may result in liability on an injunction bond given in the case."

In Massengill v. City of Clovis, 33 N. M. 394, 268 Pac. 786, a temporary injunction was granted to restrain a paving project. On hearing it was dissolved and a supersedeas refused during the appeal. While the appeal was pending the project was completed. It was claimed the

case was not moot. In holding to the contrary the Court said:

> "It is apparent, however, that appellant still has the question of his liability on his injunction bond, and the question whether certain alleged unlawful charges may be made against his property, which questions will become res adjudicata against him if the judgment below be allowed to stand by reason of the dismissal of his appeal. In such case the appeal will not be dismissed."

In New Mexico Motor Corporation v. Bliss, 27 N. M. 304, 201 P. 105, it was stated at page 108:

> "Further, the appellant would be liable on the injunction bond which it gave for attorney's fees, and any damage which appellee might have sustained by reason of the injunction. The rule in such cases is well stated by the syllabus in the case of Kaufman v. Mastin, 66 W. Va. 99, 66 S. E. 92, 25 L. R. A. (N. S.) 855, as follows:
>
> > "'Whenever the judgment, if left unreversed, will preclude the party against whom it stands as to a fact vital to his rights, though the judgment, if affirmed, may not be directly enforceable by reason of lapse of time or change of circumstances pending appeal, a writ of error will not be dismissed as involving only a moot case.'"

In Wisconsin Ice & Coal Co. v. Lueth, 213 Wis. 42, 250 N. W. 819, it was stated at page 821:

> "The contention of plaintiff that the question presented here is moot is based upon the fact that the period during which the injunction shall operate is past, that the injunction is no longer in force, and that defendant is dead. However, the injunction having been improvidently granted, with costs, the issue of damages and costs is still in the case, and it cannot be considered as being moot."

In Tolman Laundry v. Walker (Md.), 187 Atl. 836, a temporary injunction was issued to restrain a former employee from violating his agreement not to engage in a competing business for one year. On hearing, the injunction was dissolved and an appeal taken from that judgment. During the appeal the one-year period expired and it was contended that the case was moot. The Court held to the contrary, saying at page 839:

> "Notwithstanding the granting of a permanent injunction would now be nugatory, substantive rights remain for determination. When the temporary injunction was issued, the chancellor exacted a bond, with approved security, to indemnify the defendant for all costs and damages occasioned by the issuing of the temporary injunction in the event that the injunction be rescinded. So, if the primary right of the defendant to the writ of injunction be not here determined, and, in consequence, the appeal be dismissed, the plaintiff has not prosecuted the cause with effect, and its and its surety's liability under the bond would become fixed for not only costs, but also the damages sustained by the denial to the defendant of the right to serve his new employer on the route the defendant traveled while in the employment of the plaintiff. On the other hand, the determination that the plaintiff was entitled to a permanent injunction would discharge the bond. So a dismissal of the pending appeal cannot be made, since it continues to be a litigation between parties having adverse interests."

In Missouri Electric Power Co. v. Smith (Sup. Ct. of Mo. 1941), 155 S. W. (2d) 113, a preliminary injunction was granted upon the filing of bond to restrain the issuance of certain bonds. After hearing on the merits the injunction was dissolved. Pending appeal the bonds were actually issued and registered. Upon the appeal it was contended the case was moot because the Court could no

longer grant any effective relief. In denying the case was moot, the Court said at page 117:

> "Although the said bonds have been registered and an order enjoining the registration thereof would not be issued, yet an issue remains in the case and appellant has an interest in having the same determined, because appellant has incurred liability on its bond and has become liable for the costs of the litigation, should the judgment below be affirmed or the appeal be dismissed. We think the case should, therefore, be determined on its merits."

II.

The statutory language that **"such temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of five days"** is so clear there is no doubtful meaning for construction and the orders of the District Court (R. 66, 965) extending the restraining orders for an additional eleven days were void. The Circuit Court of Appeals held (R. 1022) that the purpose (of this part of the statute) was "to prevent possibility of irreparable damage and to preserve the existing status until an early hearing would determine whether or not a temporary injunction should be issued." There is nothing in the act to sustain this finding and the Court's conclusion amounts to a reading of new language into the act.

This Court stated, in United States v. Standard Brewery Co., 251 U. S. 210, 217, 64 L. ed. 229, 234:

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it."

The Congress said the restraining order was void at the end of five days and the act provides no qualification or exception. If a District Court can make one extension for some purpose, it can make twenty extensions or more for any or all purposes. The act prescribed a rigid limitation and imposed an inflexible necessity on the complainant and the Court to complete the hearing for temporary injunction within five days, if it desired that there be an injunction from the expiration of the restraining order.

The basic purpose of the Norris-LaGuardia Act is to exclude injunctive relief by federal courts in labor disputes except in the most extraordinary and extreme situations. A showing for temporary injunction does not require repetitious evidence. A prima facie case is sufficient. If the Court can extend the restraining order in all cases until a hearing for an injunction is completed and is not limited as to the length of the hearing, the statutory five days limitation for the restraining order is subject to judicial nullification. The Court of Appeals also held that if the temporary injunction in this case was proper that the restraining order merged in the injunction and the restraining order was not before that Court. To sustain that view the Court cited City of Reno v. Sierra Pacific Power Co., 44 Fed. (2d) 281, 283 (C. C. A. 9). That case is for injunctive relief to enjoin a municipality from interfering with water meters. It does not embrace a labor dispute and is not limited by the Norris-LaGuardia Act. A reading of the opinion will disclose additional distinctions, but this is sufficient that the decision is not pertinent to this case at bar.

This section of the Norris-La Guardia Act has not been passed on by this Court. If the restraining order was void between January 8 and January 19, 1942, it will not sustain contempt proceedings that may be brought because of alleged occurrences during that period. The issue is alive and should be determined by this Court.

III.

Diversity of citizenship is not in this case and a United States court is without jurisdiction unless a federal question is presented by the complaint and evidence. The test for determining the existence of a federal question and consequent jurisdiction as pointed out in the dissenting opinion (R. 1023) has been settled since the opinion of Chief Justice Marshall in Cohen v. Virginia, 6 Wheat. 263, 279, 5 L. ed. 257, 285. The rule has recently been restated in Peyton v. Railway Express Agency et al., 316 U. S. 350, 353, 86 L. ed. 1525 (decided May 25, 1942), in which this Court said:

> "Whether a suit arises under a law of the United States must appear from the plaintiff's pleading, not the defenses which may be interposed to or be anticipated by it. Petitioner's pleading, which we have summarized, satisfies this requirement since it adequately discloses a present controversy dependent for its outcome upon the construction of a Federal statute."

The majority opinion in this case (7th C. C. A.) (R. 1023) concedes the rule in the following language:

> "To give rise to Federal Jurisdiction, the basis of the suit must be concerned with the validity, construction, enforcement or effect of the statute; anything less is insufficient."

The authorities (decisions of this Court) to which reference is made in the dissenting opinion, particularly Gully v. First National Bank, 299 U. S. 109, 112, 114, 57 S. Ct. 96, 81 L. Ed. 60, 72 (opinion by Justice Cardozo), clearly explain that a suit does not arise under the laws of the United States with consequent jurisdiction in a federal court unless it "**really and substantially involves a dispute or controversy respecting the validity, construction or ef-**

fect of such a law, upon the determination of which the result depends," and that "the federal nature of the right to be established is decisive—not the source of the authority to establish it."

In this case plaintiff bases its claim for federal jurisdiction upon the theory (alleged in complaint, R. 3, 28) that because interstate commerce is involved and the Federal Constitution authorizes Congress to legislate in that field and because Congress has passed an act to regulate commerce and has enacted the Railway Labor Act and a federal statute called "War Utilities" a federal question is created in this labor dispute.

The complaint does no more than aver a general reference to the statutes. It does not specify any provision or attempt to charge how the construction or effect of the Interstate Commerce Act or other federal law is necessary to decide whether striking employees of plaintiff should be restrained. We contend that under the rule repeatedly announced by this Court and well stated in Norton v. Whiteside, 239 U. S. 144, 147, 36 S. Ct. 97, 60 L. ed. 186, 187, that the complaint is insufficient to support the action and the suit should have been dismissed by the District Court on the pleading or, better stated, that a dismissal should have been granted because the complaint disclosed a clear absence of a federal question and lack of jurisdiction.

The majority opinion (C. C. A.) affirmed jurisdiction of the subject matter because it conceived that determination for an injunction against striking employees required the construction and enforcement of some provisions of the Interstate Commerce Act. The opinion acknowledges that because "Congress has power to legislate in certain fields is insufficient to confer jurisdiction" and that "the mere fact that interstate commerce is involved and may be affected is not sufficient to justify jurisdiction of a private suit seeking protection of such commerce," and

the opinion points out that **"the commerce Act includes no specific provision as to restraint of violent strikes against an Interstate carrier at the suit of the carrier."** However, the appeals court sustained jurisdiction because the Commerce Act requires a carrier to provide reasonable and safe facilities and prohibits abandonment of all or any part of a road without authority of the Commerce Commission and because a federal statute provides criminal liability for one who derails a car or destroys a facility, etc., used in interstate commerce. The conclusion of the Court in behalf of jurisdiction is thus stated (R. 1026):

> "It cannot be that Congress imposed duties and yet intended that the carrier should be denied Federal relief from interference with carrying out such duties. Congress having set up certain requirements which the carrier must meet when others seeking to prevent it by violence from meeting those statutory obligations it should be permitted to seek protection in a Court of equity of the sovereignty imposing the obligation."

A decision for this injunction does not require a construction or enforcement of the mentioned criminal statute and plaintiff's right to be free from violent interference by striking employees in the conduct of its business does not spring from any provision of the Interstate Commerce Act. Neither the Interstate Commerce Commission, a shipper or anyone is complaining in this case that plaintiff did not perform its duties specified by that act nor is anyone charging that plaintiff abandoned any part of its road.

We suggest that the majority opinion confuses plaintiff's common law right to be free from violent interference with its statutory duties prescribed by the regulatory commerce act. The complaint here is by the carrier itself and the charge is that **plaintiff has a right** to be free from interference by its striking employees in the

performance of its business. **Plaintiff is complaining about that common law right.** No one is charging it with failure to perform duties under the commerce act. The right of plaintiff and every owner of property to be free from violent interference existed before the Commerce Act was passed. That statute did not enlarge or federalize the right, neither did the Commerce Act originally create plaintiff's natural right to engage in business. The statute was designed to regulate the carrier for the larger good of the public.

It was not the intention of Congress through the Interstate Commerce Act to regulate third parties (striking employees), but only the carriers themselves. Neither did Congress propose through this statute to regulate or solve labor disputes. The history of the act shows it was passed to curb railroad practices which were affecting the general welfare. In review of the events which lead to the law this Court stated in Texas & R. R. Co. v. I. C. C., 162 U. S. 197, 210, 40 L. ed. 940, 944:

> "From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discrimination between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with the other, leading to the oppression of entire communities. . . .
>
> "As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extended through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, s[illegible]ld deal with the evils complained of by a genera[illegible] nactment, and the statute in question was the result

When the Congress passed the Commerce Act it had a right to and did assume that the states would continue to enforce elementary police powers for the protection of all property, whether the property was used in interstate business or otherwise. Whether Congress should provide for injunctive relief against striking employees at the suit of a carrier because the Commerce Act regulates carriers for the benefit of shippers and the public is not a question for the Court, but instead a subject for legislative determination. The controlling fact is that Congress has not so legislated, and in the absence of such legislation an interstate carrier has no greater or different rights to be free from interference by its striking employees than those enjoyed by any other citizen. **The right of this plaintiff to have its property protected against violence from striking employees is not of federal origin or nature, but is a right uniformly enjoyed by all citizens, irrespective of the character of their business.**

A right such as contended for by plaintiff in this case not having its origin or grant in a federal law, is for enforcement by state courts and one over which federal courts are without jurisdiction.

The majority opinion (C. C. A.) cites In re Lennon, 166 U. S. 548, to support jurisdiction. That case was decided in April, 1897. It was a habeas corpus proceeding which emanated from an injunction granted by the Circuit Court in Toledo, Ann Arbor and Northern Michigan Ry. Co. v. Penn., 54 Fed. 730. It was an action instituted by plaintiff, an interstate carrier, against eight railroad companies, and a labor union constituted of employees of one of the defendant carriers. The complaint charged that defendants and the employees of one defendant refused to accept freight from plaintiff and that defendants were accordingly violating the duty imposed on them by the second paragraph of Section 3 of the Interstate Commerce Act, which provides that all common carriers shall afford rea-

sonable and equal facilities for the interchange of traffic. Plaintiff prayed for a mandatory writ requiring defendant carriers to perform this duty imposed by the Commerce Act and the prayer was allowed.

This decision was almost a half century before the Norris-La Guardia Act, which prohibits an injunction to compel employees to work under any circumstances. Norris-La Guardia Act, March 23, 1932, Ch. 90, Sec. 4, Subparagraph (a), 47 Stat. 70. Moreover, it is completely different from this case at bar because it is bottomed on the statutory violation by the defendants in refusing to accept interstate freight. The complainant there was the proprietor of a clear statutory right to have its freight accepted by the connecting carriers and the defendant railroads had a statatory duty to accept it. The purpose of that suit was to force acceptance of freight. The purpose of the present action is to forbid striking employees from interference with plaintiff's property. On page 533 of the opinion written by former Justice Brown of this court, the Court said:

> "There could be no doubt of the power of the Court to grant this injunction which bore solely upon the relations of the railway companies to each other."

We desire to briefly demonstrate the factual differences between other cases cited in the majority opinion (C. C. A.).

In Wabash Co. v. Hanahan, 121 Fed. 563, an injunction was sought to restrain officers of a labor union from ordering a strike. The District Judge denied the injunction on the facts. The jurisdictional question was but superficially considered and sustained on authority of Toledo Ry. Co. v. Pennsylvania Co., 54 Fed. 730, explained in one of the preceding paragraphs of this argument.

There are many distinctions between this Hanahan case and the proceedings at bar, but it is sufficient to note that under the prohibition of the Norris-LaGuardia Act (since

enacted) such an injunction could not now be allowed to restrain union leaders and employees from striking for a wage increase.

Knudsen v. Benn, 125 Fed. 636, was an oral opinion of a District Judge in a suit to enjoin members of a union not employees of plaintiff from inducing plaintiff's employees to strike. The opinion does not show what the complaint charged, and the only reference to the question of jurisdiction is this meager statement: "The acts here charged constitute an interference with interstate commerce and I suppose some matters are stated mainly to show that it is a case over which a federal court has jurisdiction." Nor does it appear what are the facts referred to as "some matters."

Stephens v. Ohio State Telephone Co., 240 Fed. 759, was a suit by subscribers of a telephone company to compel the company to furnish telephone facilities to them. The Court held it had jurisdiction because the Interstate Commerce Act gave plaintiffs the right to obtain reasonable facilities for telephone service. Since the suit was based on this right granted by a federal statute, it arose under the laws of the United States.

In King v. McLean Asylum of Massachusetts General Hospital, 64 Fed. 331, jurisdiction was based on diversity of citizenship. There was no question of jurisdiction involved.

Richards v. Town of Rock Rapids, 31 Fed. 505, raises the validity of a tax assessment on National Bank shares. The federal jurisdiction was based on Section 5211 of the Revised Statutes of the United States, which prohibited discriminatory taxation against such shares. It was claimed that the tax violated the right given by that federal law.

In Iowa Loan & Trust Co. v. Fairweather, 252 Fed. 605, plaintiff sought to resist the imposition of a state tax upon Liberty bonds. The Act of Congress providing for the issuance of such bonds declared that they should be exempt

from all taxation. It was held that a federal question was involved because plaintiff's case was based on this right to be free from taxation granted him by federal statute.

Southern Pac. Co. v. Peterson, 43 Fed. (2d) 198, was an injunction suit against the Attorney-General of Arizona to restrain the enforcement of the State Train Limit Law on the grounds that the state law was in violation of the Constitution of the United States.

In Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567, after a hearing by the parties before the Interstate Commerce Commission, the defendant refused to comply with the order of the Commission directing the defendant to receive traffic from plaintiff. Suit was filed in the federal court to force compliance with the Commission's order. Such a suit in the District Court is specifically provided for in Section 16 (12) of the Interstate Commerce Act.

Oregon R. & Navigation Co. v. Campbell, 173 Fed. 957, was a suit by a railroad to restrain the Oregon State Board of Commissioners from putting into operation and effect a schedule of freight rates on plaintiff's railroad in the state. It was charged by the railroad that the schedule was confiscatory and deprived plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Constitution.

Glenwood Light etc. Co. v. Mutual Light etc. Co., 239 U. S. 121, 60 L. ed. 174, 36 Sup. Ct. 32, was a suit brought by one public utility to restrain another utility from maintaining its poles and wires on the same side of the street as plaintiff. Plaintiff and defendant were citizens of different states and federal jurisdiction was invoked on that ground. The only question in the case was whether or not the amount in controversy was in excess of $3,000.00.

Carmichael v. Anderson, 14 Fed. (2d) 166, was a suit by the holder of one federal radio license against the holder of another license to broadcast on the same wave length.

It was held that the controversy involved an interpretation of the federal licenses and the federal statute under which they were granted. In so doing, the case involved a federal question.

The expansion of federal jurisdiction that would result from the rule announced in the majority opinion (C. C. A.) demonstrates the wisdom of the established jurisdictional test so frequently stated by this Court: Puerto Rico v. Russell & Co., 284 U. S. 476, 483, 77 L. ed. 903, 909; Louisville & Nashville R. Co. v. Mottley, 211 U. S. 149, 152, 29 S. Ct. 42, 53 L. ed. 126, 127.

According to the Circuit Court of Appeals, if a federal statute imposes a duty upon a person, judicial interpretation may read into that statute a provision that such a person has an implied federal right to be free from any act tending to obstruct or prevent the performance of that duty, and a federal court will hear cases seeking remedies for a breach of such an implied right. We suggest the vast number of duties imposed on various classes of persons by the laws of the United States. The official 1940 edition of the U. S. Code covers 4,500 large pages of fine type.

A great volume of litigation in state courts comes from automobile negligence cases. Federal law imposes upon common carriers by truck the duty to furnish transportation and facilities (Part II of the Interstate Commerce Act, Section 16, Act of June 29th, 1938, ch. 811, Sec. 16, 52 Stat. 1240, U. S. C., Title 49, Sec. 316). Assume a motorist damages a truck, thereby impeding interstate commerce. Under the reasoning of the Circuit Court of Appeals the trucker would have a federal right to be free from any act obstructing or impeding the movement of the truck, and a remedy in the federal courts for his damage.

All other interstate carriers have similar duties: Water carriers (Part III of the Interstate Commerce Act, Sec. 305, Act of Sept. 18, 1940, ch. 722, Title II, Sec. 201, 54

Stat. 934, U. S. C., Title 49, Sec. 905); telegraph companies (Act of Aug. 7, 1888, Ch. 772, Sec. 2, 25 Stat. 383, U. S. C., Title 47, Sec. 10); telephone, telegraph and radio companies (Communications Act of 1934, Sec. 201, Act of June 19, 1934, Ch. 652, Sec. 201, 48 Stat. 1070, U. S. C., Title 47, Sec. 201); air carriers (Civil Aeronautics Act of 1938, Sec. 401, Act of June 23, 1938, Ch. 601, Sec. 401, 52 Stat. 987, U. S. C., Title 49, Sec. 481); power companies (Federal Power Act, Act of June 10, 1920, Ch. 285, Sec. 201, U. S. C., Title 16, Sec. 824); pipe line companies, express companies, sleeping car companies [Interstate Commerce Act, Sec. 1, Act of Feb. 4, 1887, ch. 104, part I, 24 Stat. 319, as amended, U. S. C., Title 49, Sec. 1 (3)]. Under the majority opinion such carriers would have similar implied federal rights and U. S. courts similar jurisdiction.

Interstate commerce has been widened until it now touches nearly all phases of a citizen's life. The Food and Drug Law prescribed federal duties with respect to his food and drugs. Packers and stockyards have federally imposed duties. Security exchanges are subject to federal law as are public utility holding companies, investment companies and investment advisers. Other millions have duties imposed upon them by federal law. Following the reasoning of the Circuit Court of Appeals, each of such duties would create corresponding federal rights that could be enforced in federal courts. This was never intended by Congress.

IV.

The evidence is insufficient to show that the public officials were unable or unwilling to furnish adequate protection for plaintiff's property as required by Section 7 of the Norris-La Guardia Act.

This section (Act of Mar. 23, 1932, Ch. 90, § 7, 47 Stat. 71) provides in part:

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after findings of fact by the court to the effect—

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Plaintiff's evidence relates to incidents of disturbance and violence on December 28th, 29th, 30th, 31st and January 1st and 2nd, practically all of which occurred in Illinois and adjoining counties of Peoria and Tazewell. There were but 104 men on strike (R. 760) on a railroad which extended from Indiana to Iowa. Plaintiff had twenty-nine armed guards (R. 784), who rodes its trains, so there was one armed guard for every 3.5 strikers. There were but two arrests and no request for additional arrests (R. 393).

The Tazewell Sheriff posted deputies for 24-hour duty at the lane where the picketing was conducted (R. 724). The damage to plaintiff's property amounted to broken glass in the headlights and cabs of locomotives, the lamps of switches and cabooses. Although the Sheriffs of Peoria and Tazewell cautioned plaintiff's president that their staffs were limited, there is no evidence that either Sheriff did not act for the suppression of violence and preservation of order. There was only one specific request to the Peoria Sheriff (R. 382). On January 2nd, the day before the complaint was filed in court, plaintiff's president, Mr. McNear, dispatched telegrams to the mayors of cities and sheriffs of Central Illinois Counties requesting these officials to furnish officers to ride upon and convoy trains through their respective jurisdictions (R. 734). The officials who replied assured they would protect plaintiff's property but said they were not in a position to furnish deputies to ride the trains (R. 735).

There is no evidence that police officers and sheriffs were unable to handle any disturbance or situation to which their attention was called or which came to their notice. There is no evidence that the Governor was requested to act because of violence or disturbance. In fact, there is no proof that the chief executive of the state was notified. Under our form of government a sovereign state such as Illinois has the clear duty and unfettered power to protect the property of all its citizens, whether they are engaged in interstate transportation or any other business. The federal government was not designed or empowered to enforce local rights for the protection of property.

In Arkansas v. Kansas T. & T. Co., 183 U. S. 185, 188, 46 L. Ed. 144, 146, which was an injunction suit, this Court, speaking through former Chief Justice Fuller, said:

> "The police power was appealed to, the power to protect life, liberty, and property, to conserve the public health and good order, which always belonged to the states, and was not surrendered to the general government, or directly restrained by the Constitution."

Illinois counties are subdivisions of the sovereign state. They were created by the people for the administration of state law. Each county has a sheriff who is "the principal executive officer of the county and may exercise the powers of the sheriff at common law." The People v. Nellis, 249 Ill. 12, p. 23 (decision of Illinois' highest court). The statutes of this state provide: "Any sheriff may call to his aid, when necessary, any person, or the power of the County" (Smith-Hurd Illinois Rev. Stat., Ch. 125, Sec. 18). Cities and villages of the state are likewise subdivisions of the sovereignty and they exist for the purpose of administering law for the common welfare. The Mayor of every Illinois city by statute "has the power to call on every male inhabitant of the city over the age of 18 years to aid in enforcing laws and ordinances" (Smith-Hurd Ill.

Rev. Stat., Ch. 24, Sec. 9, City and Villages Act). The statutes of this state also provide that when a public official such as a sheriff or mayor refuses to perform his official duty he may be removed from office (Smith-Hurd Ill. Rev. Stat., Ch. 38, Sec. 449, Criminal Code).

The provision of the Norris-La Guardia Act that an injunction shall not be granted unless it is proved that the public officers are unable or unwilling to furnish adequate protection for complainant's property firmly denies federal jurisdiction for injunctive relief in a labor dispute, until it clearly appears that regularly constituted state officials, including the Governor, are proved unable or unwilling to perform their constitutional and lawful duties. Such a finding requires that such officials have refused, which amounts to an offense on the part of such officials under state law, or that they are unable to provide sufficient protection. There is no showing in this record that any public official of Illinois refused to perform such duties. The legal machinery available to sheriffs and mayors for the preservation of order, together with the constitutional power of the Governor to employ the militia, makes it manifest there was no inability of the public officials to furnish adequate protection for plaintiff's property. The fact that the respective sheriffs did not accede to the request of plaintiff's president to furnish deputies to ride or convoy the railroad trains does not constitute a legal test of the officers' unwillingness or inability to perform their duty. Neither does the fact that some violence occurred, including personal assaults between individuals out of the presence of these officers, show their refusal or inability to furnish adequate protection. Public officials and peace officers are not guarantors against commission of crime or the occurrence of violence, and the mere fact that disturbances occur does not prove such inability or unwillingness.

If the Sheriffs and the City and State Officials of Illinois were incompetent or unwilling to protect complainant's

property because of 104 striking employees, the property of other Illinois citizens is in peril, but this is not the case, and the evidence in this record fails to disclose such a breakdown of local and state government.

We suggest it would be salutary for this highest Court of the nation to say that local and state officials may not shift their constitutional duties to a federal court without making a confession of their incompetency.

V.

Section 8 of the Norris-La Guardia Act **denies** injunctive relief to any plaintiff who has failed (1) to comply with any obligation imposed by law, or (2) to make every reasonable effort to settle the dispute either by negotiation or with the aid of governmental machinery of mediation or arbitration. The lower courts have erroneously construed this section and improperly found that the evidence showed it had been complied with.

This section (Act of Mar. 23, 1932, Ch. 90, Sec. 8, 47 Stat. 72) provides:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

The pertinent facts under this point are undisputed. Prior to October, 1940, plaintiff's employees were members of a company union. Then the two railroad brotherhoods became the employees' accredited representatives under the terms of the Railway Labor Act. Negotiations for an agreement about pay and working conditions were not successful. The Brotherhoods called a strike for December

9, 1941, which was indefinitely postponed after the attack on Pearl Harbor and declaration of war. On December 17th and again on December 28th an agency of the United States Government, i. e., National Mediation Board, requested both sides to submit to arbitration. The employees agreed, but plaintiff railroad refused. In the District Court plaintiff's attorney Sprague testified (R. 789): "We did refuse to arbitrate in December, as I have already testified, and we have not changed our position in that respect."

On December 21st, when no strike order was in effect, the railroad served notice on the men that its own rates of pay and working conditions would go into effect December 29th. Upon receiving such notice the Brotherhood had the alternative of yielding to the railroad's demands or withdrawing from service. The strike was a direct result of plaintiff's enforcement of its own demands and its refusal to comply with the request of the government agency for voluntary arbitration. The employees were still working and there was no violence when plaintiff refused to arbitrate at the request of the Mediation Board on December 17th and December 28th. There is no evidence of threats of violence at that time.

The majority opinion (C. C. A.) holds that a complainant fulfills this provision of the Norris-La Guardia Act if it either mediates or negotiates or arbitrates. The opinion also points out that the Railway Labor Act specifies that refusal to arbitrate "shall not be construed as a violation of any legal obligation." The Appeals Court construes this part of the Labor Act to mean that arbitration is not a condition precedent to securing an injunction. The applicable section 8 of the Norris-La Guardia Act prohibits an injunction to a complainant who has failed to comply with any obligation imposed by law or to make every reasonable effort to settle the dispute either by negotiation or with the aid of any governmental machinery for mediation or voluntary arbitration.

It is suggested that the plain meaning of the statute does not sustain the distinction or construction of the majority opinion. The clear intent of Congress was to induce settlement without resort to the courts and adjustment without work stoppages. As pointed out in the dissenting opinion, if plaintiff had submitted to the request for arbitration the strike would have been avoided.

It must be presumed that a governmental agency would be fair, just and impartial in the conduct of the arbitration. Plaintiff offered no explanation or justification for its inflexible refusal to respond to the Government's request and its refusal was made at a time when the nation was at war. We do not contend that the railroad here was under legal compulsion to submit to arbitration, but we do say that when a complainant does an act which provokes a strike (giving notice that its own working conditions would be effective December 29th), and, in addition, stubbornly refuses the requested co-operation of the Government when such refusal is not explained, such a complainant is not in such a state of equity to justify equitable relief in its behalf by a federal court, and in these circumstances that an injunction is forbidden by the Norris-La Guardia Act.

Respectfully submitted,

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